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Draft elements for an international legal instrument against illegal trafficking and transport of migrants

(Proposal submitted by Austria and Italy)

When drafting an additional instrument to the Convention relating to the illegal trafficking and transport of migrants, the following elements should be included:

"PREAMBLE

"*Concerned* about the threat posed by the rapid development of illegal trafficking and transport of migrants, especially by sea,

"*Convinced* that the illegal trafficking and transport of migrants is a particularly heinous form of transnational exploitation of individuals in distress,

"*Concerned* that an increasing number of migrants are being smuggled for purposes of prostitution and sexual exploitation,

"*Convinced* that only a global approach to this phenomenon, including socio-economic measures, can lead to the suppression of this crime,

"*Desiring* to supplement the United Nations Convention against Transnational Organized Crime[a] by a protocol directed specifically against illegal trafficking and transport of migrants as a first step towards the eradication of this crime,"

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[a][To be completed.]

"CHAPTER I. GENERAL PROVISIONS

"*Article A*

"Any person who intentionally procures, for his or her profit, repeatedly and in an organized manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident commits the offence of 'illegal trafficking and transport of migrants' within the meaning of this Protocol.

"*Article B*

"1. Any person who attempts to commit or who commits an act constituting participation as an accomplice in any such trafficking and transport, in an attempt to commit such trafficking and transport or in organizing or ordering others to commit such trafficking and transport likewise commits an offence within the meaning of this Protocol.

"2. Any person whose illegal entry is procured or intended by such trafficking and transport shall not become punishable on account of such trafficking and transport.

"*Article C*

"For the purpose of this Protocol,

"(a) 'Illegal entry' means the crossing of borders without disposing of the necessary requirements for legal entry into the receiving State;

"(b) The illegal entry into the territory of another State Party shall be considered equal to the illegal entry into the territory of the State Party concerned.

"*Article D*

"If more than one State Party intends to resume jurisdiction over an alleged offender in accordance with article 9 of the Convention, the States Parties concerned shall consult each other with a view to renouncing jurisdiction in order to make possible proceedings in the State Party most directly affected by the commission of the trafficking and transport.

"CHAPTER II. SPECIAL PROVISIONS ON THE ILLEGAL TRAFFICKING AND TRANSPORTING OF MIGRANTS BY SEA

"*Article E*

"1. For the purpose of chapter II, 'vessel' means ship of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submarines or any other floating craft.

"2. Chapter II of this Protocol does not apply to:

"(a) Warships; or

"(b) Ships owned or operated by a State when being used for non-commercial government purposes.

"*Article F*

"1. Nothing in chapter II of this Protocol shall affect in any way the rules of international law concerning the exercise of:

"(a) State powers related to investigations or to the accomplishment of administrative functions on board vessels not flying their flag;

"(b) The right of any State to adopt, in international waters, the measures under articles H and I below, with respect to a vessel having no nationality or flying the flags of more than one country and using them at its convenience, when reasonable grounds exist to believe that it is involved in the trafficking of migrants, provided that one of the following links with that State exists:

"(i) Based on its route, the vessel is undoubtedly bound for its coasts;

"(ii) The vessel is armed or governed or manned by nationals.

"2. If a measure is taken in implementation of this article, the States Parties concerned shall take into due account the need not to impair the security of human life at sea and the safety of the vessel and its cargo, as well as the commercial and legal interests of any other State concerned and those of the State of which the migrants and crew are nationals.

"*Article G*

"Each State Party that has reasonable grounds to believe that a vessel flying its flag—or flying no flag, or a vessel which, even if flying a foreign flag or refusing to fly its flag, has actually the same nationality as the vessel exercising the right under article F, paragraph 1 (b)—is involved in the trafficking of migrants, may request the assistance of other States Parties to combat such trafficking. The requested Parties shall offer any reasonable assistance necessary in order to achieve this goal.

"*Article H*

"Each State Party that has reasonable grounds to believe that a vessel flying the flag of or registered with another State Party, navigating freely in accordance with international law, is involved in the trafficking of migrants may notify the State whose flag it flies, request a verification of the registration and, after receiving confirmation, may request authorization to adopt the necessary measures to guarantee the control and containment of the flow of individuals bound for its territory, which may include verifying the vessel's right to fly its flag, stopping the vessel, boarding it and diverting it.

"*Article I*

"Activities related to verifying the vessel's right to fly that flag, stopping, boarding and diverting the vessel shall be performed in the following manner:

"(a) Verifying the vessel's right to fly its flag: the vessel may be requested to give information on its nationality and the nationality of its crew, its port of departure and its destination;

"(b) Stopping the vessel: the vessel may be ordered to stop or to change course and reduce speed appropriately, following the procedures mentioned in subparagraph (a) above, so that a team of inspectors may board the vessel to ascertain the truth of the information communicated and whether any migrants are on board;

"(c) On-board visit: when the vessel is stopped or has changed course as ordered and at the speed ordered, the aforementioned inspection team shall board the vessel to carry out the necessary verification of documents and inspections, in order to ascertain whether the vessel is involved in the trafficking of migrants;

"(d) Diversion: if the vessel refuses to permit an on-board visit or if the on-board inspection reveals that irregularities are being committed, the vessel shall be ordered to go back to the port of departure or to divert to the nearest port of a Contracting Party, designated according to article L below, and the State of which the migrants are nationals shall be informed of the outcome of the on-board visit. If the vessel fails to comply with such order, it shall be escorted to the prescribed destination.

"Article J

"All measures taken in order to comply with the provisions under articles G, H and I above shall be implemented only by warships or military naval craft.

"Article K

"1. No activity undertaken within the scope of articles G, H and I above may in any way jeopardize the safety of the vessel or the commercial interests of the State whose flag it flies or of any other State, or interfere with the exercise of the rights of jurisdiction of any other coastal State.

"2. Any State Party that has undertaken any action under the terms of articles G, H and I above shall promptly notify the flag State of its final outcome.

"3. Each State Party shall designate the competent authority—or competent authorities, where necessary—for receiving and responding to the requests referred to in articles G and H above. The designation shall be notified to the Secretary-General of the United Nations and to all the other Parties within one month of the designation.

"Article L

"Each State Party shall:

"(a) Designate as soon as possible the ports to which vessels caught in flagrante delicto of transporting migrants can be diverted;

"(b) Take control of the vessels referred to in subparagraph (a) above that are diverted to its ports in order to prevent the commission of further illegal activities;

"(c) Authorize the vessel or the aircraft that is acting under article I above to redeploy in the ports designated to this end for technical purposes;

"(d) Provide berthing facilities and water supplies for the port visits referred to in subparagraph (c) above.

"Article M

"Articles F-K above shall apply when:

"(a) The vessel on which the trafficking and transport of migrants is under way is entering into the territorial waters of a Contracting Party;

"(b) There are reasonable grounds to suspect that such vessel is bound for entering into the territorial waters or otherwise procuring the illegal entry of migrants into the territory of a Contracting Party.

"CHAPTER III. FINAL PROVISIONS

"*Article N*

"1. States Parties shall adopt every legislative and administrative measure needed in order to comply with the obligations deriving from this Protocol, in respect for the principles of sovereignty, territorial integrity and non-interference in the internal affairs of States.

"2. States Parties shall consider the conclusion of bilateral or regional agreements or understandings aimed:

"(a) At establishing the most appropriate and effective measures to prevent, combat and limit illegal trafficking and transport of migrants, in accordance with this Protocol; or

"(b) At enhancing the provisions of this Protocol among themselves.

"*Article O*

"When there are reasonable grounds to believe that a crime is being committed, as defined in this Protocol, the States Parties that might be concerned for any reason shall cooperate and exchange any useful information, in accordance to their national legislation, and shall coordinate any other administrative measures among themselves.

"*Article P*

"Except if otherwise provided for, the provisions of the Convention shall apply.

"*Article Q*

"1. For the purpose of examining the progress made by States Parties in achieving the implementation of the obligations undertaken in the present Protocol, States Parties shall provide periodic reports to the United Nations Commission on Crime Prevention and Criminal Justice.

"2. States Parties shall provide such reports together with the reports submitted in accordance with article 23 of the Convention.

"*Article R*

"The provisions of this Protocol shall be without prejudice to the obligations of States Parties under the 1951 Convention[b] and the 1967 Protocol[c] relating to the Status of Refugees.

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[b]United Nations, *Treaty Series*, vol. 189, No. 2545.

[c]Ibid., vol. 606, No. 8791.

"*Article S*

"1. This Protocol is open for signature to all States until _____ at the Headquarters of the United Nations in New York.

"2. This Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

"3. This Protocol is open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

"*Article T*

"1. This Protocol shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

"2. For each State ratifying or acceding to this Protocol after the deposit of the twentieth instrument of ratification or accession, the Protocol shall enter into force on the thirtieth day after deposit by such State of the instrument of ratification or accession.

"*Article U*

"1. Any State Party may withdraw from this Protocol by written notification to the Secretary-General of the United Nations.

"2. Withdrawal shall take effect twelve months after the date on which notification is received by the Secretary-General of the United Nations.

"*Article V*

"The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States."